No._____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

LAWRENCE ANDREW INGRAM- PETITIONER, Pro se

VS.

JULIE L. JONES as SEC'Y DEPT. OF CORRECTIONS, and PAM BONDI, as ATTORNEY GENERAL of FLORIDA-RESPONDENT'S

APPENDIX

In Support Of

PETITION FOR WRIT OF CERTIORARI

INDEX TO APPENDICES

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16745
Non-Argument Calendar

D.C. Docket No. 5:13-cv-00199-WTH-PRL

LAWRENCE ANDREW INGRAM,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(June 1, 2018)

Before TJOFLAT, MARTIN, and NEWSOM, Circuit Judges.

PER CURIAM:

Lawrence Andrew Ingram, a Florida prisoner proceeding pro se, appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. We granted a certificate of appealability on whether Ingram's trial counsel was constitutionally ineffective for failing to move for a new trial based on the state trial court's erroneous ruling that evidence excluded under Richardson v. State, 246 So. 2d 777 (Fla. 1971), could be admitted for impeachment purposes if Ingram testified. After careful review, we affirm.

I.

A. TRIAL PROCEEDINGS

Ingram was accused of long-term sexual abuse by his daughter in 2004. Shortly before trial, the government disclosed that law enforcement found evidence on Ingram's computer showing visits to websites featuring incestuous sexual relationships. Ingram's trial counsel moved to exclude this evidence under Richardson, arguing it was substantial evidence and its late disclosure was extremely prejudicial to the defense because it would take an expert witness's help to prepare to rebut it. The state trial court granted the motion, noting it had taken a forensic computer analyst to compile the evidence for the government; the evidence was relevant and "materially injurious" to Ingram; and there was no opportunity before trial for defense counsel to review the evidence. However, the court also stated that if Ingram got on the stand and said "he's never looked at

pornography," he would open the door to this evidence. His counsel said, "I agree," and did not object to the ruling.

At trial, both Ingram's daughter and son testified he had sexually abused them. On June 10, 2005, before the defense began presenting its case, Ingram, his counsel, and the court had an extended discussion about Ingram's decision on whether to testify. Ingram acknowledged he understood it was ultimately his decision to testify or not. His counsel explained why he advised Ingram against testifying. Counsel said he thought the computer evidence was "potentially devastating." Although counsel did not think Ingram's general testimony denying he had sexually abused his daughter would open the door to the computer evidence, counsel was concerned that simply taking the stand would open Ingram up to credibility attacks, including questions related to viewing pornography. The court agreed: "[I]f [Ingram] chooses to be a witness, . . . I can picture the question, [y]ou deny having sex with your children, but you like to watch web sites, don't you, or, you like to watch movies about that, don't you?" The court said if Ingram answered no, then the computer evidence would be in. Ingram and his counsel both indicated they understood. Ingram then told the court he would not testify because he knew it would lead to the admission of the computer evidence.

The jury convicted Ingram of sexually abusing his daughter, but not his son. A Florida Appeals Court summarily affirmed. Ingram v. State, 939 So. 2d 113 (Fla. 5th DCA 2006) (table decision).

B. POST-CONVICTION PROCEEDINGS

1. State Court

Ingram sought post-conviction relief under Florida Rule of Criminal Procedure 3.850. In part, he alleged ineffective assistance of counsel based on his lawyer's (1) failure to object to the state trial court's erroneous ruling that the computer evidence could be used to impeach Ingram's credibility, (2) failure to move for a new trial based on the erroneous ruling because it prevented Ingram from testifying, and (3) incorrect advice to Ingram on the night of June 9, 2005 that the Richardson ruling was preserved for appeal regardless of whether he testified the next day. The state habeas court held an evidentiary hearing in 2011.

At the hearing, Ingram's trial counsel said he talked to Ingram about testifying many times before trial. Counsel believed that, in general, a defendant's testimony is important in a child abuse case if the defendant can explain why a child might fabricate an allegation. Counsel said the main reason Ingram didn't testify was because it would lead to the admission of the computer evidence.

Counsel also said he knew the state trial court's Richardson ruling was wrong and Ingram couldn't legally be impeached by the computer evidence if he

took the stand.[1] He explained that he deliberately did not point out the error because he believed the judge would have continued the trial to allow the defense time to prepare a rebuttal to the computer evidence and then allowed that evidence to come in not just for impeachment purposes, but also in the government's case-in-chief. Counsel had experience with judges doing this before: "cure the Richardson hearing problem by doing a recess, having me take the deposition, and then change his mind and let [the challenged evidence] in." And because counsel believed the computer evidence to be "devastating," he did not want it "com[ing] in in any shape or fashion."

Ingram's trial counsel agreed that the trial court's erroneous Richardson ruling could have been raised in a motion for new trial and that there was no reason not to include it because "at that point, [Ingram's] convicted." He further explained the failure to file the motion for new trial resulted from a procedural error in his office, for which he took responsibility. Counsel also agreed that Ingram could not have knowingly waived his right to testify without being told that the state trial court's Richardson ruling was erroneous. Counsel could not recall whether he told Ingram the Richardson ruling was erroneous or his concern that the judge would respond by continuing the trial and allowing the government to bring in the computer evidence in its case-in-chief.

[1] See Elledge v. State, 613 So. 2d 434, 436 (Fla. 1993) ("[T]here is neither a rebuttal nor impeachment exception to the Richardson rule.").

Ingram also testified at the evidentiary hearing. Ingram said his testimony at trial would have (1) denied the allegations; (2) expanded on his alibi defense for one instance of sexual abuse; (3) described the "dynamics" of his household, including his relationship with his daughter and possible reasons she might have had to fabricate the charges; (4) explained the context for statements he made after his arrest; (5) rebutted or explained the contents of his daughter's journal; and (6) generally "explain[ed] the whole family picture of how we got before the Court that day." Ingram then gave this testimony in detail. He also said that on the night of June 9, 2005, he and his trial counsel discussed whether the Richardson ruling was preserved for appeal in the context of whether he should testify.

The state habeas court denied post-conviction relief. In relevant part, the court determined Ingram's trial counsel's performance was not deficient because he had "ample strategic reasons" not to challenge the state trial court's erroneous Richardson ruling and these reasons were "reasonable." The state habeas court also determined Ingram couldn't show prejudice because "[t]here [was] no showing that had [Ingram] testified, the outcome of the proceeding would have been different." The court noted Ingram would have only denied the sexual allegations, and the witnesses against him were cross-examined. The state habeas court also concluded Ingram could not show prejudice from counsel's failure to

file a motion for new trial on the basis of the erroneous Richardson ruling because that ruling "was tested on appeal."

The state habeas court determined there was nothing in the record or that came out in the evidentiary hearing to support Ingram's claims that his counsel misadvised him about whether he needed to testify to preserve the erroneous Richardson ruling for appeal. That court said "the matter was discussed and counsel advised the Defendant about the consequences of him testifying, and the Defendant elected not to testify." Ingram appealed the denial of post-conviction relief, but it was affirmed without written opinion. Ingram v. State, 100 So. 3d 712 (Fla. 5th DCA 2012) (per curiam).

2. Federal Court

Ingram then filed a motion under 28 U.S.C. § 2254 in federal court. After the State responded, the district court denied relief. Ingram filed a motion to alter or amend judgment, which was denied. The district court also denied a certificate of appealability ("COA"). After Ingram filed a notice of appeal, this Court granted a COA on the following issue:

> Whether counsel was ineffective for failing to file a motion for a new trial on the basis that the trial court's ruling regarding the evidence of incest-related material on Mr. Ingram's computer violated Richardson v. State, 246 So. 2d 777 (Fla. 1971).

II.

When a state habeas court has adjudicated a claim on the merits, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") allows a federal court to grant habeas relief only if the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). A federal court must presume the correctness of the state court's factual findings unless the petitioner overcomes them by clear and convincing evidence. See id. § 2254(e)(1); Putman v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001). Thus, while we review de novo the federal district court's decision, we review the state habeas court's decision with deference. Reed v. Sec'y, Fla. Dep't of Corr., 593 F.3d 1217, 1239 (11th Cir. 2010).

To prove ineffective assistance of counsel, the petitioner must show his attorney's performance was deficient and that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). An attorney's performance is deficient if it falls below "the range of competence demanded of attorneys in criminal cases." Id. (quotation omitted). Courts apply a "strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance" and the petitioner must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. at 689, 104 S. Ct. at 2065 (quotation omitted). "When this presumption is combined with § 2254(d), the result is double deference to the state court ruling on counsel's performance." Daniel v. Comm'r, Ala. Dep't of Corr., 822 F.3d 1248, 1262 (11th Cir. 2016). Prejudice means "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

III.

At the state evidentiary hearing, Ingram's trial counsel acknowledged his mistake in failing to file a motion for new trial, in which he would have included the erroneous Richardson ruling as a basis for relief. The state habeas court determined the erroneous Richardson ruling was tested on appeal, and so there was no prejudice from the failure to file a motion for new trial for this reason. However, the district court found Ingram did not challenge the Richardson ruling on appeal, and the State does not dispute this finding. Thus, the state habeas court's decision that Ingram couldn't show prejudice under Strickland was based on an "unreasonable determination of the facts." See 28 U.S.C. § 2254(d)(2), (e)(1). We must therefore resolve Ingram's ineffective assistance claim "without

the deference AEDPA otherwise requires." Panetti v. Quarterman, 551 U.S. 930, 953, 127 S. Ct. 2842, 2858 (2007).

Applying the Strickland test, however, we conclude Ingram cannot show prejudice. That is, he cannot show he would have been entitled to a new trial if his counsel had filed a motion based on the trial court's erroneous Richardson ruling. See Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

Under Florida law, a trial court shall grant a new trial if "[t]he court erred in the decision of any matter of law arising during the course of the trial" and the "substantial rights of the defendant were prejudiced thereby." Fla. R. Crim. P. 3.600(b)(6). Generally, Florida courts cannot "entertain[] a motion for new trial . . . absent an objection." State v. Goldwire, 762 So. 2d 996, 998 (Fla. 5th DCA 2000); accord State v. Brockman, 827 So. 2d 299, 303 (Fla. 1st DCA 2002). The purpose of this "contemporaneous objection rule" is "to give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors." State v. Rhoden, 448 So. 2d 1013, 1016 (Fla. 1984), rev'd on other grounds by Cargle v. State, 770 So. 2d 1151, 1152–54 (Fla. 2000). "The rule prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant." Id.

However, a Florida trial court can consider a claimed error on a motion for a new trial even when there wasn't a contemporaneous objection, if the error was "fundamental." See Goldwire, 762 So. 2d at 998. Fundamental errors "go[] to the foundation of the case." Jackson v. State, 983 So. 2d 562, 568 (Fla. 2008) (quotation omitted). This type of error "reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Goldwire, 762 So. 2d at 998 (quotation omitted). But even fundamental errors will escape review if defense counsel affirmatively agreed to the trial court's conduct—that is, they were aware of the court's omission or error, and affirmatively agreed to it or asked for it. See Blandon v. State, 657 So. 2d 1198, 1199 (Fla. 5th DCA 1995) ("Fundamental error analysis would not apply if the defendant knowingly waived the [objection]," that is, if "defense counsel makes a tactical decision" not to object).

During the Richardson hearing and during the trial court's discussion with Ingram and his counsel about Ingram's decision to testify, counsel did not object to the trial court's ruling that the computer evidence could come in as impeachment if Ingram testified. Absent a contemporaneous objection or fundamental error, the trial court could not have entertained a motion for new trial on this ground. See Goldwire, 762 So. 2d at 998.

Even assuming the erroneous Richardson ruling was a fundamental error under Florida law so that the contemporaneous-objection rule did not apply, Blandon would still have barred the trial court from entertaining a motion for new trial on this ground. At the state evidentiary hearing, trial counsel testified he knew the trial court's Richardson ruling was erroneous at the time it was made. He said he did not object to it because he knew, from experience, that the court would simply grant a continuance to cure the prejudice from the late disclosure of the computer evidence, and then allow it to come in. Counsel believed this evidence would be "devastating" to his client's case. Based on this testimony, the state habeas court determined counsel's failure to object was not deficient performance because he had "ample strategic reasons" not to challenge the trial court's erroneous Richardson ruling and "[t]hose reasons were, under the circumstances, reasonable." The state court's finding that counsel's failure to object was not deficient is owed double deference. See Daniel, 822 F.3d at 1262. Ingram has not shown this finding was contrary to, or involved an unreasonable application of, clearly established federal law, and we denied a COA on the issue of counsel's deficient performance for failure to object.[2] See 28 U.S.C. § 2254(d)(1); Strickland, 466 U.S. at 689, 104 S. Ct. at 2065.

[2] Ingram argues his counsel's tactical decision was unreasonable because it interfered with his right to testify. Even if this argument were not waived by Ingram's failure to raise it in his opening brief, see Sapuppo v. Allstate Floridian Ins. Co., 739 F.3d 678, 682–83 (11th Cir.

Trial counsel's failure to object was not deficient conduct, but a reasonable tactical choice. Under Blandon, the tactical choice means counsel affirmatively agreed to the trial court's ruling, "knowingly waived" his objection, and could not "benefit from that decision" on a motion for new trial. See Blandon, 657 So. 2d at 1199; Goldwire, 762 So. 2d at 998. Therefore, even if counsel had filed a motion for new trial based on the erroneous Richardson ruling, Ingram would not have been entitled to a new trial under Florida law. Ingram cannot show prejudice from counsel's failure to file a motion for a new trial, and thus cannot prove ineffective assistance of counsel. See Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

AFFIRMED.

2014), it is without merit. Ingram's argument is another ineffective assistance of counsel claim—this one alleging counsel's failure to inform Ingram that the state trial court's Richardson ruling was erroneous and include him in the strategic decision-making prejudiced Ingram by preventing him from making a knowing decision not to testify. Ingram testified at the state evidentiary hearing, however, that he and his counsel discussed whether the Richardson ruling was preserved for appeal on the night of June 9, 2005 in the context of whether or not Ingram should testify. Inherent in that discussion is an explanation of why the Richardson ruling was appealable—that is, why it was erroneous or objectionable. Thus, the record belies Ingram's claim of ineffective assistance on this ground.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

July 11, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 16-16745-FF
Case Style: Lawrence Ingram v. Secretary, Florida Department, et al
District Court Docket No: 5:13-cv-00199-WTH-PRL

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Janet K. Mohler, FF/lt
Phone #: (404) 335-6178

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-16745-FF

LAWRENCE ANDREW INGRAM,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

Appeal from the United States District Court
for the Middle District of Florida

BEFORE: TJOFLAT, MARTIN and NEWSOM, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by the Appellant is DENIED.

ENTERED FOR THE COURT:

Barkett D. Martin

UNITED STATES CIRCUIT JUDGE

ORD-41

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

LAWRENCE ANDREW INGRAM,

Petitioner,

v. CASE NO. 5:13-cv-199-Oc-10PRL

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

This cause is before the Court upon a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 1) filed by Lawrence Andrew Ingram ("Petitioner"). Respondents filed a response to the petition (Doc. 5). Petitioner filed a reply (Doc. 9). Petitioner raises nine claims in his petition. Upon due consideration of the record, the Court concludes that the petition must be denied.

I. Background and Procedural History

Petitioner was charged by third amended information with two counts of sexual battery on a child less than twelve years old by a person older than eighteen who was in a position of familiar authority (counts one and four) and four counts of sexual battery upon a person over the age of twelve but less than eighteen years of age by a person of familial or custodial authority (counts two, three, five, and six) (App. A at 155-56).[1] After a jury trial, Petitioner was convicted of counts one, two, and three and acquitted of counts four,

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[1]Unless otherwise noted, citations to appendices (App. ___ at ____) refer to the exhibits contained in Respondents' Sealed Appendix to the Response (Doc. 8).

five, and six. Id. at 184-95. The trial court sentenced Petitioner to a term of life in prison for count one, and to concurrent thirty-year terms of imprisonment for counts two and three. Id. at 206-07. Petitioner appealed, and the Fifth District Court of Appeal ("Fifth DCA") affirmed per curiam (App. C).

Petitioner filed a motion to correct illegal sentence pursuant to Rule 3.800(a) of the Florida Rules of Criminal Procedure (App. D at 6-7). The trial court denied the motion. Id. at 9. Petitioner appealed, and the Fifth DCA affirmed *per curiam*. Id. at 31. Petitioner then filed a petition for writ of habeas corpus with the Fifth DCA alleging ineffective assistance of appellate counsel (App. E at 2-42). The Fifth DCA denied the petition without discussion. Id. at 140.

Petitioner subsequently filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure (App. F at 1-36). Petitioner later filed an amendment to the motion. *Id.* at 82-88. The trial court held an evidentiary hearing, after which it denied relief. *Id.* at 107-21. Petitioner appealed, and the Fifth DCA affirmed *per curiam* (App. H at 117).

II. Governing Legal Principles

A. Antiterrorism Effective Death Penalty Act ("AEDPA")

Pursuant to the AEDPA, federal habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the

State court proceeding.

28 U.S.C. § 2254(d). This standard is both mandatory and difficult to meet. *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014). A state court's summary rejection of a claim, even without explanation, qualifies as an adjudication on the merits which warrants deference. *Ferguson v. Culliver*, 527 F.3d 1144, 1146 (11th Cir. 2008).

"Clearly established federal law" consists of the governing legal principles, rather than the *dicta*, set forth in the decisions of the United States Supreme Court at the time the state court issues its decision. *White*, 134 S. Ct. at 1702; *Carey v. Musladin*, 549 U.S. 70, 74 (2006)(citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). A decision is "contrary to" clearly established federal law if the state court either (1) applied a rule that contradicts the governing law set for by the Supreme Court case law; or (2) reached a different result from the Supreme Court when faced with materially indistinguishable facts. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010) (internal quotations and citation omitted); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003).

A state court decision involves an "unreasonable application" of the Supreme Court's precedents if the state court correctly identifies the governing legal principle but applies it to the facts of the petitioner's case in an objectively unreasonable manner, *Brown v. Payton*, 544 U.S. 133, 134 (2005); *Bottoson v. Moore*, 234 F.3d 526, 531 (11th Cir. 2000); or, "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Bottoson*, 234 F.3d at 531 (quoting *Williams*, 529 U.S. at 406). The "unreasonable application" inquiry "requires the

state court decision to be more than incorrect or erroneous"; it must be "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75-77 (2003) (citation omitted); *Mitchell*, 540 U.S. at 17-18; *Ward*, 592 F.3d at 1155. Petitioner must show that the state court's ruling was "so lacking justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *White*, 134 S. Ct. at 1702 (quoting *Harrington v. Richter*, 562 U.S. 86 (2011)).

B. Standard for Ineffective Assistance of Counsel

In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance. 466 U.S. 668, 687-88 (1984). A petitioner must establish that counsel's performance was deficient and fell below an objective standard of reasonable and that the deficient performance prejudiced the defense. *Id.* This is a doubly deferential standard. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) (quoting *Knowles v. Mirzayanze*, 129 S. Ct. 1411, 1420 (2009) (citing *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003)).

The focus of inquiry under *Strickland's* performance prong is "reasonableness under prevailing professional norms." 466 U.S. at 688-89. In reviewing counsel's performance, a court must adhere to a strong presumption that "counsel's conduct falls within the wide range of reasonable profession assistance." *Id.* at 689. Indeed, the petitioner bears the heavy burden to "prove, by a preponderance of the evidence, that counsel's performance was unreasonable[.]" *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006). A court must "judge the reasonableness of counsel's conduct on the facts of the particular case,

viewed as of the time of counsel's conduct," applying a "highly deferential" level of judicial scrutiny. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (quoting *Strickland*, 466 U.S. at 690).

As to the prejudice prong of the *Strickland* standard, Petitioner's burden to demonstrate prejudice is high. *Wellington v. Moore*, 314 F.3d 1256, 1260 (11th Cir. 2002). Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. 687. That is, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

It is well established that a defendant has the right to effective counsel on appeal. *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir.1984). The same standard utilized by courts to analyze claims of ineffective assistance of trial counsel under *Strickland* also applies to appellate counsel. *Eagle v. Linahan*, 279 F.3d 926, 938 (11th Cir. 2001) (citing *Matire v. Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987)). When evaluating the prejudice prong of Strickland in relation to ineffective assistance of appellate counsel, the Court "must decide whether the arguments [Petitioner] alleges his counsel failed to raise were significant enough to have affected the outcome of Petitioner's appeal." *See United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000) (citing *Miller v. Dugger*, 858 F.2d 1536, 1538 (11th Cir.1988), cert. denied, 531 U.S. 1131 (2001)). "If [the Court] conclude[s] that the omitted claim would have had a reasonable probability of success, then counsel's

performance was necessarily prejudicial because it affected the outcome of the appeal." *Eagle*, 279 F.3d at 943 (citing *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990)).

III. Analysis

A. Claim One

Petitioner alleges trial counsel was ineffective for failing to file a motion for new trial (Doc. 1 at 6). Petitioner contends counsel should have filed such a motion in order to challenge the trial court's erroneous ruling regarding a discovery violation[2] and obtain judicial review of the weight of the evidence. *Id.* Petitioner raised this claim in his Rule 3.850 motion for post-conviction relief, and the trial court denied the claim after holding an evidentiary hearing (App. F at 112-13).

During the evidentiary hearing, defense counsel admitted that he did not file a motion for new trial (App. G at 134-35). In denying this claim, the trial court noted that although defense counsel testified that he did not file a motion for new trial, the discovery violation issue was raised on appeal and rejected by the Fifth DCA.[3] *Id.* at 113. Additionally, the court concluded that Petitioner had failed to demonstrate that he was

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[2]Approximately one week prior to trial, defense counsel received information that the Lake County Sheriff's Office had performed a forensic examination of Petitioner's computer and determined that the computer contained pornographic movies and photographs and internet searches related to websites depicting incestuous relationships (App. B at 135-37). Defense counsel moved to prohibit the introduction of this evidence pursuant to *Richardson v. State*, 246 So. 2d 777 (Fla. 1971) (hôlding a trial court must conduct an inquiry when a discovery violation occurs to determine whether the violation was (1) willful or inadvertent, (2) substantial or trivial, and (3) had a prejudicial effect on the aggrieved party's trial preparation). *Id.* at 137. The trial court concluded that due to the late nature of the evidence and potential prejudice to Petitioner, it would not be admissible at trial. *Id.* at 142. However, the trial court also noted that the evidence could possibly be admitted as impeachment evidence if Petitioner testified and opened the door with regard to the matter. *Id.* at 142-43. Petitioner did not testify at trial.

[3]Contrary to the trial court's assertions, Petitioner did not challenge the ruling made during the *Richardson* hearing on direct appeal (App. C).

prejudiced by counsel's failure to challenge the weight of the evidence. *Id.* at 114. The Fifth DCA *per curiam* affirmed (App. H at 117).

Petitioner essentially claims that had counsel challenged the trial court's ruling with regard to the computer forensic evidence, he would have testified at trial. The trial court's ruling that the computer evidence would be admissible as impeachment evidence was erroneous as a matter of state law. *See Dines v. State*, 909 So. 2d 521 (Fla. 2d DCA 2005) (holding "[o]nce evidence is excluded in a *Richardson* hearing, it cannot be admitted for any reason, not even as impeachment or rebuttal evidence"). However, Petitioner cannot demonstrate that this ruling was contrary to, or involved an unreasonable application of, clearly established federal law. The Supreme Court of the United States has held that statements which are inadmissible in the State's case in chief would be admissible on cross-examination for impeachment purposes to attack the credibility of a defendant's testimony. *See Harris v. New York*, 401 U.S. 222 (1971). Therefore, Petitioner's claim is based on a state law issue, and federal habeas corpus does not lie to correct errors of state law. *See Lewis v. Jeffers*, 497 U.S. 764, 780 (1990).

Additionally, Petitioner cannot demonstrate prejudice because Petitioner merely speculates that had he testified at trial, the result of the proceeding would have been different. Speculation will not sustain a claim for ineffective assistance of counsel. *See Tejeda v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (stating vague, conclusory, speculative and unsupported claims cannot support relief for ineffective assistance of counsel).

Furthermore, there was sufficient evidence presented at trial to convict Petitioner

even if he had testified. Petitioner's daughter, A.I., spoke with police after they arrived at a party she was attending due to a noise complaint (App. B at 175-80). At that time, A.I. disclosed the sexual abuse to the officers. *Id.* The officer who spoke with A.I. did not think she had been drinking and noted that before she disclosed the abuse, she was not "in trouble" for being at the party. *Id.* at 180, 196.

A.I. testified that Petitioner molested her for the first time on Christmas Eve in 1997, when she was ten years old. *Id.* at 221. A.I. noted that the power had gone out that night, and Petitioner placed a candle in her bedroom and then began to sexually abuse her. *Id.* at 222. A.I. testified that the abuse occurred between two to four times per week for years. *Id.* at 224. A.I. did not tell anyone because she was scared. *Id.* at 225. A.I. stated that her father was physically abusive toward her mother and verbally abusive to the family. *Id.* A.I. was worried that if she disclosed the abuse, Petitioner would hurt her mother, brother, or sister. *Id.* A.I. admitted that she had falsely reported that Petitioner had physically abused her in 2003. *Id.* at 226. A.I. explained that she had wanted to disclose the sexual abuse at that time, but she was scared, so instead she told people Petitioner had hit her and left a bruise on her arm. *Id.*

A.I. also stated that she told the police about the sexual abuse after the party because she wanted to get it out. *Id.* at 229. A.I. told the jury that the sexual abuse was "ruining her life;" she was depressed, her grades were poor, she was not getting along with people, and she hated her life. *Id.* A.I. described other incidents were Petitioner had sexual intercourse with her and performed oral sex on her in 2004. *Id.* at 230. The State entered evidence of a letter Petitioner wrote to A.I. after he was arrested. *Id.* at 232. Petitioner

stated that he hoped A.I. and her mother could forgive him for the things he had done to hurt them. *Id.* at 235.

A.I. further testified that she had written poems in her journal that discussed the sexual abuse. *Id.* at 298. A.I. read one of the poems she had written, which discussed "a secret kept within the depths of [A.I.'s] soul" and stated that she never told anyone about a secret wherein someone took her "only gift" and hurt her for nine years with his "wandering hands." *Id.* at 298-99. Finally, A.I. stated she had witnessed Petitioner fondling her sister on one occasion. *Id.* at 299.

Kenny Rodrigue, an employee for Sumter Electric Cooperative, testified that business records from the company reflected that a power outage occurred in Clermont, Florida, on December 25, 1997 at 12:28 a.m. and lasted until 3:12 a.m. *Id.* at 317-18. Deborah Ingram, Petitioner's wife and A.I.'s mother, testified that she asked Petitioner, "Did you do what she said you did," and Petitioner responded, "Whatever she said." *Id.* at 460. Petitioner's adult stepdaughter, Shannon, testified that she was also sexually abused by Petitioner. *Id.* at 471. The abuse began when she was in middle school and occurred until she was sixteen or seventeen. *Id.* at 471-72, 475-76. Shannon admitted on cross-examination that she had tried to report the abuse in high school, but then she panicked and told the investigator she had made the story up. *Id.* at 473-74, 78.

In light of the evidence presented at trial, Petitioner cannot demonstrate that counsel's failure to file a motion for new trial challenging the trial court's discovery ruling resulted in prejudice pursuant to *Strickland*. Accordingly, this portion of claim one is denied pursuant to § 2254(d).

Petitioner also asserts that trial counsel failed to challenge the weight of the evidence in a motion for new trial. A trial court is "generally accorded broad discretion in deciding whether to grant a motion for a new trial." *Moore v. State*, 800 So. 2d 747, 748 (Fla. 5th DCA 2001) (citations omitted). In granting or denying a motion for new trial, the state court must examine whether the jury verdict is against the weight of the evidence. *Id.* at 749. Florida Rule of Criminal Procedure. 3.600(a)(2) "enables the trial judge to reweigh the evidence and determine the credibility of witnesses so as to act, in effect, as an additional juror." *Id.* (quotation omitted).

Petitioner has not demonstrated prejudice because the weight of the evidence supports the jury's verdict. Furthermore, a " federal habeas court has no power to grant habeas corpus relief because it finds that the state conviction is against the 'weight' of the evidence." *Young v. Kemp*, 760 F.2d 1097, 1105 (11th Cir. 1985). Consequently, the Court concludes that the State court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Therefore, claim one is denied pursuant to § 2254(d).

B. Claim Two

Petitioner alleges trial counsel was ineffective for failing to investigate an alibi defense for count one (Doc. 1 at 15). Petitioner states that he and his son were stuck in a traffic jam during the time that count one was alleged to have occurred. *Id.* Petitioner states that counsel should have investigated and called the deputy sheriff from the scene of the accident that caused the traffic jam. *Id.* Petitioner raised this claim in his Rule 3.850 motion, and the trial court held an evidentiary hearing on this issue, after which it denied

relief, concluding Petitioner could not demonstrate deficient performance or prejudice (App. F at 117-18). The Fifth DCA affirmed *per curiam* (App. H at 118).

"[E]vidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or an affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim." *United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991) (footnotes omitted); *Dottin v. Sec'y Dep't of Corr.*, No. 8:07-cv-884-T-27MAP, 2010 WL 376639, at *6 (M.D. Fla. Sept. 16, 2010) ("self-serving speculation about potential witness testimony is generally insufficient to support a claim of ineffective assistance of counsel. A petition must present evidence of the witness testimony in the form of actual testimony or an affidavit."). Petitioner's claim is speculative because he has not presented an affidavit from the potential witness. Therefore, Petitioner has not made the requisite factual showing, and his self-serving speculation will not sustain this claim of ineffective assistance of counsel. *See Tejeda v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (stating vague, conclusory, speculative and unsupported claims cannot support relief for ineffective assistance of counsel).

Furthermore, Petitioner cannot demonstrate prejudice. Even if a witness had been called to corroborate Petitioner's allegations that he was stuck in traffic on Christmas Eve, this witness would not conclusively exculpate Petitioner. The victim testified that the abuse began on Christmas Eve after midnight when the electricity had gone out. Petitioner's wife testified that the power was out that night (App. B at 538). Petitioner testified at the evidentiary he was stuck in traffic on Christmas Eve due to an accident, and he did not

arrive home until approximately 2:30 a.m. (App. G at 56-57). However, the crime could have been committed after Petitioner arrived home. Therefore, the trial court's denial of this claim was not contrary to, or an unreasonable application of, clearly established federal law. Accordingly, claim two is denied pursuant to § 2254(d).

C. Claim Three

Petitioner alleges the trial court erred by failing to instruct the jury on an essential element of the crime (Doc. 1 at 24). Respondents argue that this claim is unexhausted (Doc. 5 at 26).

Pursuant to the AEDPA, federal courts are precluded, absent exceptional circumstances, from granting habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-44 (1999). In order to satisfy the exhaustion requirement, a state petitioner must "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citations omitted); *McNair v. Campbell*, 416 F.3d 1291, 1302 (11th Cir. 2005). The petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998).

Claim three is unexhausted because it was not raised on direct appeal in the state court (App. C). Petitioner raised a claim that trial counsel was ineffective for failing to object to an incomplete jury instruction, however, Petitioner later abandoned that claim (App. F at 119).

The Court is precluded from considering this claim, as it would be procedurally defaulted if Petitioner returned to state court. *Smith v. Secretary, Dept. of Corr.*, 572 F.3d 1327, 1342 (11th Cir. 2009) (citing *Snowden*, 135 F.3d at 736 ("[W]hen it is obvious that the unexhausted claims would be procedurally barred in state court due to state-law procedural default, we can forego the needless 'judicial ping-pong' and just treat those claims now barred by state law as no basis for federal habeas relief.")). Petitioner could not return to the state court to raise this claim because he has already appealed and a belated appeal would be untimely. Thus, claim three is procedurally defaulted.

Procedural default will be excused only in two narrow circumstances. First, a petitioner may obtain federal review of a procedurally defaulted claim if he can show both "cause" for the default and actual "prejudice" resulting from the default. *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). The second exception, known as the "fundamental miscarriage of justice," only occurs in an extraordinary case, where a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

In his reply, Petitioner asserts that the failure to raise this claim is due to ineffective assistance of appellate counsel (Doc.9 at 4-5). A claim of ineffective assistance of appellate counsel can be cause for procedural default if that claim also was exhausted in the state court. *See Brown v. United States*, 720 F.3d 1316, 1333 (11th Cir. 2013); *Dowling v. Sec'y for Dep't of Corr.*, 275 F. App'x 846, 847-48 (11th Cir. 2008) (citing *Edwards v. Carpenter*, 529 U.S. 446, 450-51 (2000)). However, Petitioner did not raise a claim of ineffective assistance of appellate counsel with regard to this matter in his state habeas

petition (App. E at 1-41). Therefore, Petitioner's ineffective assistance of appellate counsel claim is procedurally defaulted and cannot be considered as cause for the default of his trial court error claim. *Dowling*, 275 F. App'x at 248.

Furthermore, to the extent Petitioner relies on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), to establish cause for the procedural default, his reliance on *Martinez* is misplaced. *Martinez* is limited to claims of ineffective assistance of trial counsel "that are otherwise procedurally barred due to ineffective assistance of post-conviction counsel." *See Gore v. Crews*, 720 F.3d 811, 816 (11th Cir. 2013). Therefore, because *Martinez* has not been extended to ineffective assistance of appellate counsel claims, Petitioner cannot demonstrate cause or prejudice to excuse the procedural default. Thus, the Court is barred from reviewing this claim, and it will be denied.

D. Claim Four

Petitioner alleges that trial counsel was ineffective for failing to (1) challenge the trial court's erroneous discovery ruling and (2) object to the trial court's interference with his right to testify (Doc. 1 at 28-36). Petitioner raised these claims in his Rule 3.850 motion, and the trial court held an evidentiary hearing on the claims (App. G at 1- 179).

At the evidentiary hearing, Petitioner stated that he wanted to testify in order to tell his side of the story but felt he was prevented from doing so based on the trial court's ruling with respect to the computer evidence. *Id.* at 20, 36. Petitioner would have testified that he did not commit the crimes and there were ongoing fights in the household with regard to his daughter's behavior, therefore, she had motive to fabricate the allegations. *Id.* at 45-46.

Former defense counsel John Spivey ("Spivey") testified that the computer evidence was a factor in [Petitioner's decision] not to testify. *Id.* at 120. Spivey explained that he did not object to the trial court's ruling on the admissibility of the computer evidence as a matter of trial strategy. *Id.* at 130-31. Spivey testified that he was worried if he had objected to the trial court's ruling during the *Richardson* hearing, the trial court would have continued the trial, allowed him to depose the computer forensic analyst, and then admitted the evidence in the State's case. *Id.* at 131. Spivey could not remember if he discussed the foregoing concerns issue with Petitioner. *Id.* at 132.

On cross-examination, Spivey stated that he discussed with Petitioner whether or not he would make a good witness to the jury. *Id.* at 138. Spivey stated that although Petitioner is intelligent, he was "a bit intense" and had a tendency not to focus, therefore, Spivey had some concerns about Petitioner's testimony. *Id.* at 138-39. Spivey also had concerns about whether Petitioner could "withstand" the prosecutor's "very aggressive" style of questioning. *Id.* at 140. However, Spivey recognized that it was Petitioner's decision with regard to whether he wanted to testify. *Id.* at 139. Spivey also testified with respect to the computer forensic evidence that "there would be nothing more painful and difficult to contend with in the trial" because he "felt like then the jury wouldn't listen to anything else because it would be so painfully difficult to explain away . . . ." *Id.* at 143.

The trial court denied these claims, noting that defense counsel's decision to forego challenging the trial court's ruling with respect to the computer evidence amounted to trial strategy (App. F at 119-20). Furthermore, the trial court concluded that Petitioner could not

demonstrate prejudice with regard to the interference with his right to testify. *Id.* at 120. The Fifth DCA affirmed *per curiam* (App. H at 118).

The Supreme Court of the United States has stated that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690-91. The Court further stated that "strategic choices made after less than complete investigation are reasonable . . . to the extent . . . professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*

Spivey's decision to forego objecting to the trial court's ruling with regard to the computer forensic evidence amounts to trial strategy. Petitioner has not shown that this strategy was unreasonable. Petitioner cannot demonstrate deficient performance on the part of counsel or prejudice. The state court's denial of this portion of claim four contrary to or an unreasonable application of, *Strickland*, nor was it based on an unreasonable determination of facts in light of the evidence presented. Accordingly, this claim is denied.

Additionally, Petitioner has not shown that counsel's failure to object to the trial court's alleged interference with his right to testify resulted in prejudice. Criminal defendants have a right to testify on their own behalf. *Rock v. Arkansas*, 483 U.S. 44, 50-51 (1987); *Harris v. New York*, 401 U.S. 222, 230 (1971). However, even if counsel had objected to the trial court's erroneous ruling regarding the admissibility of the computer forensic evidence, Petitioner cannot demonstrate a reasonable probability existed that the jury would have acquitted him of the charges against his daughter in light of the evidence

presented at trial, as the Court discussed *supra*. There is no indication that the state court's determination of this claim was contrary to, or resulted in an unreasonable application of clearly established federal law. Accordingly, claim four is denied pursuant to § 2254(d).

E. Claim Five

Petitioner asserts trial counsel was ineffective for failing to file a motion to disqualify the trial judge (Doc. 1 at 39). In support of this claim, Petitioner contends that the trial judge "convinced" the State to alter its trial strategy and call his son's therapist as a witness at trial. *Id.* at 41-42. Petitioner argues a trial judge may not "advocate" for a particular outcome in a case by "helping one side present their case." *Id.* at 42. Petitioner raised this claim in his Rule 3.850 motion, and the trial court held an evidentiary hearing on this claim (App. G at 152). Spivey testified that he did not "as an officer of the court, from [his] perspective, see anything that would rise to the level of recusal." *Id.* at 152-53. The trial court denied the claim, concluding counsel's failure to file a motion to disqualify the trial judge amounted to trial strategy and Petitioner could not demonstrate prejudice (App. F at 115-16). The Fifth DCA affirmed *per curiam* (App. H at 118).

Spivey's decision to forego objecting to the trial court's ruling with regard to the computer forensic evidence amounts to trial strategy. Petitioner has not shown that this strategy was unreasonable. Additionally, Petitioner has not shown that counsel's actions resulted in prejudice. A review of the trial transcript reflects that the trial court did not make any biased or prejudicial rulings. Additionally, although the State called his son's therapist at trial, Petitioner was acquitted of the charges with regard to his son. In sum, Petitioner

cannot demonstrate that but for counsel's actions, the outcome of trial would have been different. The state court's denial of denial of this claim was not contrary to, or an unreasonable application of, federal law. Therefore, claim five is denied pursuant to § 2254(d).

F. Claim Six

Petitioner alleges trial counsel was ineffective for failing to object to the trial court's interference with the plea negotiations (Doc. 1 at 47). In support of this claim, Petitioner states that the trial court interfered with his right to accept the State's plea offer of fifteen years in prison to be followed by fifteen years of probation. *Id.* at 48. Petitioner raised this claim in his Rule 3.850 motion, and the trial court held an evidentiary hearing on the claim, after which it denied relief (App. F at 109). The trial court noted that at no time did Petitioner indicate that he was willing to accept the State's plea offer. *Id.* The trial court concluded Petitioner had failed to demonstrate deficient performance or prejudice. *Id.* at 110. The Fifth DCA affirmed *per curiam* (App. H at 118).

Petitioner testified at the evidentiary hearing that the trial court did not allow him to ask questions with regard to the plea offer and essentially withdrew the offer before Petitioner could accept it (App. G at 17-18). Prior to trial, Petitioner was advised regarding a plea offer of fifteen years in prison followed by fifteen years of sex offender probation (App. A at 259). Petitioner had from February 23, 2005, through March 7, 2005, to contemplate the plea offer. During the March 7, 2005, pretrial hearing, Petitioner stated that he did not want to accept a plea while his son was accusing him of something that was untrue. *Id.* at 269. The prosecutor noted for the record that the original plea offer was thirty

years in prison. *Id.* Spivey asked for the plea to be kept open for two additional days as he had been newly appointed to the case. *Id.* at 271.

On March 9, 2005, Spivey indicated that he had gone over the plea offer with Petitioner. *Id.* at 277. Spivey stated that he did not know whether Petitioner had made a decision. *Id.* Counsel had several conversations with Petitioner, and Petitioner did not indicate on the record whether he wished to accept the plea. *Id.* at 277-78. The trial court stated, "Right. All right, Mr. Spivey, evidently he doesn't want to make a decision. I'll make the decision for him. This case is set for trial next Monday . . . ." *Id.* at 278. The trial court also noted that Petitioner faced a mandatory life sentence and that his decision to proceed to trial was free and voluntary. *Id.* at 281. At no point did Petitioner object or state that he wanted to enter the plea. *Id.*

There is no indication from the record that the trial court interfered with Petitioner's plea. At no time during the proceedings did Petitioner state that he wanted to enter a plea. Instead, Petitioner had previously noted that he was unwilling to accept a plea. Petitioner's statement to the trial court carries a strong presumption of truth, and Petitioner has not sufficiently demonstrated that the Court should overlook his testimony. *Blackledge v. Allison*, 432 U.S. 63, 73-74 (1977). Furthermore, Petitioner cannot demonstrate that counsel's failure to object resulted in prejudice, because Petitioner cannot show that but for counsel's actions, he would have accepted the plea instead of going to trial. The state court's determination is neither contrary to, nor an unreasonable application of, federal law. Accordingly, claim six is denied pursuant to § 2254(d).

G. Claim Seven

Petitioner claims appellate counsel was ineffective for failing to challenge the trial court's ruling with regard to the computer forensic evidence (Doc. 1 at 53-58). Petitioner raised this claim in his state habeas petition, and the Fifth DCA denied the petition without discussion (App. E).

As noted *supra* with regard to claim one, the trial court's determination that the computer evidence was admissible as rebuttal evidence was erroneous. *See Dines*, 909 So. 2d at 521. However, because defense counsel did not object to this ruling, the matter was not preserved for appellate review. *See Harrell v. State*, 894 So. 2d 935, 939-40 (Fla. 2005) (in order to preserve an error for appellate review a party must make a timely, contemporaneous objection, state the legal ground for the objection, and obtain a ruling on that objection). The sole exception to the "contemporaneous objection" requirement is fundamental error. *Id.* at 941. In other words, to be considered on appeal the instant claim had to amount to fundamental error, "reach down into the validity of the trial itself to the extent that the verdict of guilty could not have been obtained without the assistance of the alleged error." *Id.* (quotation omitted).

Erroneous rulings with regard to *Richardson* matters are subject to harmless error review. *See Elmer v. State*, 140 So. 3d 1132 (Fla. 2014).[4] Therefore, because the trial court's error did not amount to fundamental error, appellate counsel's failure to raise this claim on appeal did not result in prejudice because the claim did not have a reasonable probability of success. Furthermore, as the Court concluded *supra* in claim four, Petitioner

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[4]Contrary to Petitioner's assertions, the error was not fundamental. Only the failure to hold an adequate *Richardson* hearing amounts to fundamental error. *See McDonnough v. State*, 402 So. 2d 1233 (Fla. 5th DCA 1981). The trial court did not fail to hold an adequate *Richardson* hearing in this case. Instead, the trial court made an erroneous evidentiary ruling after determining a *Richardson* violation had taken place.

has not demonstrated that he was prejudiced by the trial court's erroneous ruling. Although Petitioner elected not to testify in light of the ruling, there is no indication that had Petitioner testified the result of the trial would have been different.

The state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Claim seven is denied pursuant to § 2254(d).

H. Claim Eight

Petitioner alleges appellate counsel was ineffective for failing to argue that the trial judge departed from his role as a neutral and detached arbiter when he gave the State "strategic advice" (Doc. 1 at 60). Petitioner raised this claim in his state habeas petition, and the Fifth DCA denied the petition without discussion (App. E).

Defense counsel did not file a motion to disqualify the trial judge because he did not think anything occurred which warranted recusal (App. G at 152-53). Therefore, because there was no objection with regard to the trial judge's alleged bias, the matter was not preserved for appellate review. *See Harrell v. State*, 894 So. 2d 935, 939-40 (Fla. 2005) (in order to preserve an error for appellate review a party must make a timely, contemporaneous objection, state the legal ground for the objection, and obtain a ruling on that objection). The sole exception to the "contemporaneous objection" requirement is fundamental error. *Id.* at 941. In other words, to be considered on appeal the instant claim had to amount to fundamental error, "reach down into the validity of the trial itself to the extent that the verdict of guilty could not have been obtained without the assistance of the alleged error." *Id.* (quotation omitted).

Petitioner has not demonstrated that the trial court's actions rose to the level of fundamental error or that he was deprived of a fair trial. As noted *supra*, Petitioner was acquitted of the charges with regard to his son. Therefore, appellate counsel's failure to raise this claim on appeal did not result in prejudice because t he claim did not have a reasonable probability of success on appeal. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Claim eight is denied pursuant to § 2254(d).

I. Claim Nine

Petitioner claims appellate counsel was ineffective for failing to argue that trial counsel was ineffective when he failed to challenge the violation of his right to testify (Doc. 1 at 64). Petitioner raised this claim in his state habeas petition, and the Fifth DCA denied the petition without discussion (App. E).

Claims of ineffective assistance of counsel cannot be raised on direct appeal when the claims are not apparent on the face of the record. *See Latson v. State*, 193 So. 3d 1070 (Fla. 2016) (noting that with rare exceptions, claims of ineffective assistance of counsel should be raised in a post-conviction motion because they are fact-specific claims that may require an evidentiary hearing). As the Court discussed in relation to claim four, the trial court held an evidentiary hearing on Petitioner's ineffective assistance of counsel claim. Therefore, the claim would not have been properly raised on direct appeal, and appellate counsel did not act deficiently by failing to raise this claim.

Additionally, Petitioner cannot demonstrate that appellate counsel's actions resulted in prejudice. Petitioner has not shown that a reasonable probability exists that he would have been acquitted of the charges against his daughter even if he had testified. The state

court's denial of this claim was not contrary to, or an unreasonable application of, clearly established federal law. Accordingly, claim nine is denied pursuant to § 2254(d).

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus filed by Lawrence Andrew Ingram (Doc. 1) is **DENIED** and the case is **DISMISSED** with prejudice.

2. The Clerk of Court is directed to enter judgment and close this case.

3. Petitioner's Motion for Leave to File Memorandum (Doc. 14) is **DENIED**.

DONE AND ORDERED in Ocala, Florida, this 20th day of September, 2016.

UNITED STATES DISTRICT JUDGE

OrlP-3
Copies to:
Lawrence Andrew Ingram
Counsel of Record

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16745-F

LAWRENCE ANDREW INGRAM,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Lawrence Ingram, proceeding pro se, is a Florida prisoner serving a life sentence for: (1) one count of sexual battery on a child less than 12 years old by a person older than 18 who is in a position of familial authority; and (2) two counts of sexual battery on a person over the age of 12, but less than 18, by a person of familial authority. Mr. Ingram asks this Court for a certificate of appealability ("COA") after the District Court denied his habeas corpus petition brought under 28 U.S.C. § 2254.

BACKGROUND

Plea Negotiations

Prior to trial, the prosecutor offered Mr. Ingram a plea deal of 15-years imprisonment followed by 15 years of probation. Mr. Ingram originally had until March 7, 2005 to contemplate the plea offer. During the March 7, 2005 pretrial hearing, Mr. Ingram said he did not want to accept the plea deal. The court reminded Mr. Ingram that, in the event that he went to trial and lost, he faced a mandatory life sentence. Defense counsel John Mr. Spivey asked for the plea offer to be kept open for two more days, as he had only recently been appointed to the case.

When the hearing resumed two days later, Mr. Spivey said he had gone over the plea offer at length with Mr. Ingram but did not know whether Mr. Ingram had made a decision. Mr. Spivey had several conversations with Mr. Ingram about the plea offer during the hearing and conveyed to him that the offer would be revoked if he did not accept it that day. Mr. Ingram continued to refuse to affirmatively accept or reject the plea deal. Eventually, the trial court said: "All right, Mr. Spivey, evidently he doesn't want to make a decision. I'll make the decision for him. This case is set for trial next Monday . . . ." At no point did Mr. Ingram object, request further opportunity to speak to Mr. Spivey, or state that he wanted to enter a plea.

Richardson Hearing

Approximately one week before trial, the prosecutor told defense counsel that the Sheriff's Office had found internet searches on Mr. Ingram's computer for websites depicting incestuous sexual relationships. Defense counsel moved to prohibit the introduction of this evidence under Richardson v. State, 246 So. 2d 771 (Fla. 1971).[1]

Before opening arguments began, the trial court held a Richardson hearing to determine the admissibility of the incest-related internet searches. Defense counsel argued this evidence was extremely prejudicial. Although he did not believe that the disclosure of this evidence only one week before trial was a product of prosecutorial misconduct, he argued there was not enough time to prepare to effectively rebut the evidence at trial, especially because an expert witness would be needed to do so. Therefore, counsel asked the court to bar admission of the evidence.

The prosecutor explained that the delay was caused by the difficulty in obtaining the information from Mr. Ingram's computer, as it appeared that someone had attempted to "scrub" the websites from the browsing history. The prosecutor also said the only purpose for offering the evidence at trial was to show

[1] In Richardson, the Florida Supreme Court held that when a discovery violation occurs, a trial court must conduct an inquiry to determine whether the violation (1) was willful or inadvertent, (2) was substantial or trivial, and (3) had a prejudicial effect on the aggrieved party's trial preparation. See Richardson, 246 So. 2d at 775.

"consciousness of guilt" from the fact that Mr. Ingram apparently attempted to scrub the websites from his computer. Upon questioning from the trial court, the prosecutor acknowledged that the state had known for at least four months that there might have been pornographic material on Mr. Ingram's computer, but failed to alert the defense to the possibility.

The trial court ruled that the state could not use the evidence in its case-in-chief. The court determined the evidence was relevant but "materially injurious" to Mr. Ingram, who had no opportunity to review the evidence, and there was "no opportunity now." But the court then said:

> I'll put [Mr. Ingram] [on] warning, though. For [Mr. Ingram] to get on the witness stand and say, I don't do pornography and I don't watch those and that's against my religion, because he's famous about talking about how religious he is. If he gets on the stand and starts talking about how religious he is and how he's never looked at pornography and how he would never do this, then I believe he's opened the door . . . so I'm not going to let him get away with allegedly possibly lying or prevaricating while he's on the witness stand . . . And so he needs to be aware of that.

The trial court then ruled that if Mr. Ingram testified and denied watching pornography, the prosecutor could introduce the evidence about the pornographic websites found on his computer. Defense counsel did not object to this ruling.

The State's Case at Trial

At trial, Mr. Ingram's daughter, A.I., testified that her father sexually abused her for many years. According to A.I., Mr. Ingram molested her for the first time

on Christmas Eve in 1997 when she was ten years old. The abuse then occurred between two to four times per week for years. A.I. explained that she did not tell anyone about the abuse for many years because she was afraid that if she disclosed the abuse, Mr. Ingram would hurt her, her mother, or her siblings.

Mr. Ingram's wife also testified. She explained that she asked Mr. Ingram if he had done what A.I. described, and he told her that he had. In a letter that Mr. Ingram wrote to A.I. after he was arrested, Mr. Ingram said he hoped that A.I. and her mother could forgive him for the things he had done to hurt them. The letter was admitted into evidence.

One of the charges against Mr. Ingram was for allegedly sexually abusing his son. The trial court recommended to the prosecutor that the state call the son's therapist as a witness to testify about the son's allegations of abuse. At first the prosecutor told the court she had considered calling the therapist but decided against it. However, after the court prodded her to have the therapist testify, the prosecutor eventually called the therapist as a witness.

The Defense Case at Trial

After the state rested its case-in-chief, defense counsel told the court he had a lengthy conversation with Mr. Ingram about whether he would testify. Mr. Ingram acknowledged to the court that he knew it was his decision whether or not to testify. Counsel then explained that he believed the evidence of pornography

from Mr. Ingram's computer was "potentially devastating" and, in light of the risk of opening the door to this evidence, he had advised Mr. Ingram not to testify.

The trial court commented that:

> [I]n cross-examination [the prosecutor] may have a line of questions they want to ask him. If he denies—like for instance, I can picture the question, You deny having sex with your children, but you like to watch web sites, don't you, or you like to watch movies about that, don't you? If he says no, well, then, [the computer evidence is] in. And that's open cross-examination. I mean, it's up to him.

Defense counsel and Mr. Ingram both indicated they understood the court's point. The trial court then asked Mr. Ingram if he intended to testify, and Mr. Ingram said he would not testify because he knew it would lead to the admission of the computer evidence, which he disputed.

After the defense rested, the case was submitted to the jury. The jury returned a verdict finding Mr. Ingram guilty of: (1) one count of sexual battery on a child less than 12 years old by a person over 18 who is in a position of familial authority; and (2) two counts of sexual battery on a person over the age of 12, but less than 18, by a person of familial authority. The jury acquitted Mr. Ingram of all charges related to the alleged sexual abuse of his son. Mr. Ingram appealed, and the state appellate court affirmed his convictions and sentences.

State Post-Conviction Proceedings

Mr. Ingram then filed in the state trial court a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850. First, Mr. Ingram argued counsel was

ineffective for failing to: (a) object to the trial court's erroneous Richardson ruling that, in the event Mr. Ingram testified, the prosecutor could use the computer evidence as impeachment material; (b) move for a new trial based on the erroneous ruling because it prevented Mr. Ingram from testifying; and (c) move for a new trial based on the weight of the evidence. He also claimed appellate counsel was ineffective for failing to raise the erroneous Richardson ruling on appeal.

Next, Mr. Ingram said trial counsel was ineffective for failing to investigate and call an alibi witness. Mr. Ingram explained that on Christmas Eve in 1997—the night Mr. Ingram allegedly abused his daughter for the first time—he and his son were stuck in traffic due to a car crash on the road they were on. He claimed that because of the traffic jam, he did not get home until after the time when A.I. alleged he molested her. Mr. Ingram argued counsel should have called as a witness the deputy sheriff who investigated the car accident to confirm Mr. Ingram's claim that he was stuck in the traffic caused by the accident.

Mr. Ingram also claimed trial counsel was ineffective for failing to file a motion to disqualify the trial judge after the prosecutor called Mr. Ingram's son's therapist as a witness only because the judge told the prosecutor to do so. Finally, Mr. Ingram said trial counsel was ineffective for failing to object to the trial court's interference with plea negotiations.

Defense counsel Mr. Spivey testified at the evidentiary hearing in the Rule 3.850 proceeding. Mr. Spivey said he talked to Mr. Ingram a number of times about testifying at trial. Mr. Spivey believed that a defendant's testimony was particularly important in a sexual abuse case. He explained that the main reason Mr. Ingram did not testify was because it would likely lead to the admission of the computer evidence.

Mr. Spivey testified that he knew the trial judge's Richardson ruling—that the incest-related material was admissible for impeachment purposes—was erroneous. See Elledge v. State, 613 So. 2d 434, 436 (Fla. 1993) ("There is neither a rebuttal nor impeachment exception to the Richardson rule."). But he said he decided not to challenge the ruling. Mr. Spivey believed that if he had objected, the judge would have continued the trial to allow Mr. Spivey time to prepare a defense to the computer evidence and then allow the state to admit it, not only for impeachment purposes but also in the state's case-in-chief. Mr. Spivey had previous experiences where a trial judge had done this. Mr. Spivey felt that the evidence of the incest-related websites would be "devastating," and he was "paranoid" that pointing out the error in the court's ruling would lead to the evidence being admitted at trial.

Mr. Spivey acknowledged he could and should have raised the erroneous Richardson ruling in a motion for a new trial. He said he failed to do this only

because of an administrative error at his law firm. He takes "full responsibility" for that failure.

Following the evidentiary hearing, the state trial court denied Mr. Ingram's claims. On appeal, the state appellate court summarily affirmed.

§ 2254 Proceeding

Mr. Ingram then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in federal district court. Mr. Ingram asserted five claims:[2]

(1) counsel was ineffective for failing to: (a) object to the trial court's erroneous Richardson ruling; (b) move for a new trial based on the Richardson ruling; (c) move for a new trial based on the weight of the evidence; and (d) raise the Richardson ruling on appeal;

(2) counsel was ineffective for failing to investigate and call an alibi witness;

(3) the trial court erred by failing to instruct the jury on an essential element of the crime, and appellate counsel was ineffective for failing to raise the issue on appeal;

(4) (a) counsel was ineffective for failing to file a motion to disqualify the trial judge; and (b) appellate counsel was ineffective for failing to raise this issue on appeal; and

(5) counsel was ineffective for failing to object to the trial court's interference with plea negotiations.

The District Court denied Mr. Ingram's § 2254 petition. Mr. Ingram then moved to alter or amend the judgment, pursuant to Fed. R. Crim. P. 59(e), and for

[2] Mr. Ingram's claims have been consolidated and reorganized for clarity.

a COA. The District Court denied the Rule 59(e) motion, finding that Mr. Ingram failed to demonstrate that the court had made a manifest error of law or overlooked facts. The court also denied a COA.

Mr. Ingram now moves this Court for a COA and for leave to proceed in forma pauperis ("IFP") on appeal.

DISCUSSION

To obtain a COA, a § 2254 petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner satisfies this requirement by demonstrating that "reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000) (quotation omitted).

Under the Antiterrorism and Effective Death Penalty Act of 1996, if a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. §§ 2254(d)(1), (2). We review the district court's decision de novo, but review the state habeas court's

decision with deference. Reed v. Sec'y, Fla. Dep't of Corr., 593 F.3d 1217, 1239 (11th Cir. 2010).

For an ineffective-assistance claim in a § 2254 petition, the inquiry turns on whether the relevant state court decision was contrary to, or an unreasonable application of, Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). To succeed on an ineffective-assistance claim under Strickland, the petitioner must show: (1) his attorney's performance was deficient; and (2) the deficient performance prejudiced his defense. Id. at 687, 104 S. Ct. at 2064. Counsel's performance is deficient only if it falls "below an objective standard of reasonableness." Id. at 688, 104 S. Ct. at 2064. Prejudice is established if the petitioner shows a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068.

Claim 1: *Richardson* Ruling

In Claim 1, Mr. Ingram argued that counsel was ineffective for failing to: (a) object to the trial court's erroneous Richardson ruling that, in the event Mr. Ingram testified, the prosecutor could use the incest-related computer evidence as impeachment material; (b) move for a new trial based on this erroneous ruling because it prevented Mr. Ingram from testifying; and (c) move for a new trial based on the weight of the evidence. He also contended that (d) appellate counsel

was ineffective for failing to challenge the trial court's erroneous Richardson ruling on appeal.

In Florida, a trial court must conduct a Richardson hearing when a discovery violation occurs to determine whether the violation was (1) willful or inadvertent, (2) substantial or trivial, and (3) had a prejudicial effect on the aggrieved party's trial preparation. Richardson, 246 So. 2d at 775. Once the court has determined that evidence should be excluded, the evidence "cannot be admitted for any reason, not even as impeachment or rebuttal evidence." Dines v. State, 909 So. 2d 521, 523 (Fla. 2d DCA 2005); see also Elledge, 613 So. 2d at 436 ("There is neither a rebuttal nor impeachment exception to the Richardson rule.").

Here, the trial court ruled that the evidence of incest-related websites found on Mr. Ingram's computer should be excluded from trial because it was substantial and prejudicial and Mr. Ingram had insufficient time to prepare a defense. However, the court said the prosecutor could use the evidence to impeach or rebut Mr. Ingram's testimony if he denied viewing pornographic material on his computer. This ruling was erroneous under Florida law. See Elledge, 613 So. 2d at 436; Dines, 909 So. 2d at 523.

Subclaim 1(a)

First, Mr. Ingram argued that counsel's failure to object to the erroneous Richardson ruling amounted to ineffective assistance.

Mr. Ingram has failed to satisfy the deficient-performance prong of Strickland on this claim. Defense counsel testified at the evidentiary hearing that he recognized the error, but decided not to object as a matter of strategy because he was concerned that if he did object, the trial court would withdraw the Richardson ruling and continue the trial to allow him time to prepare a defense to the computer evidence, so the state could introduce the evidence in its case-in-chief. Counsel had previously seen a court do this when presented with the same situation. In light of the extremely prejudicial nature of the computer evidence, counsel's decision to avoid calling the court's attention to the error—thus ensuring the evidence would not be admitted as part of the state's case-in-chief—was not unreasonable and, thus, did not amount to deficient performance. See Strickland, 466 U.S. at 687–88, 104 S. Ct. at 2064–65. Therefore, Mr. Ingram is not entitled to a COA on subclaim 1(a).

Subclaim 1(b)

Next, Mr. Ingram argued that counsel was ineffective for failing to file a motion for a new trial based on the trial court's erroneous Richardson ruling. At the evidentiary hearing, counsel admitted there was no excuse for his failure to file a motion for a new trial based on the Richardson error. Thus, his performance was deficient. See id.

Mr. Ingram has also shown that this deficient performance prejudiced him. The erroneous Richardson ruling operated to prevent Mr. Ingram from testifying in his own defense. Specifically, as counsel explained at the evidentiary hearing, Mr. Ingram ultimately chose not to testify because of the concern that his testimony would open the door to the computer evidence. Based on the trial court's hypothetical cross-examination question—in which the court hypothetically inquired about Mr. Ingram's pornography habits—it appeared almost certain that if Mr. Ingram took the stand, the computer evidence would be admitted. Thus, it was clear Mr. Ingram decided not to testify as a direct result of the trial court's erroneous ruling. And there is a reasonable probability that Mr. Ingram's testimony would have made a difference in the outcome of the trial. Id. at 694, 104 S. Ct. at 2068. The direct evidence against Mr. Ingram was based on A.I.'s testimony. Although there was some evidence that tended to corroborate A.I.'s testimony, there was nothing that directly corroborated her allegations. As a result, Mr. Ingram's testimony (presumably, that the events described by A.I. did not occur), if credited by the jury, could have led to a different outcome at trial. See id. Therefore, the state court arguably applied federal law in an unreasonable fashion to deny this ineffective-assistance claim.[3] See 28 U.S.C. § 2254(d)(1).

[3] In denying this claim, the state court said that Mr. Ingram could not show prejudice from counsel's failure to file a motion for a new trial based on the erroneous Richardson ruling because the issue was raised and denied on direct appeal. However, the record shows that the

Because reasonable jurists could debate whether the District Court erred in deferring to the state court's denial of this claim, see Slack, 529 U.S. at 484, 120 S. Ct. at 1604, Mr. Ingram is entitled to a COA on subclaim 1(b).

Subclaim 1(c)

In subclaim 1(c), Mr. Ingram argued that counsel was ineffective for failing to move for a new trial on the ground that the verdict was against the weight of the evidence. Mr. Ingram has failed to satisfy both the deficient-performance and prejudice prong of Strickland on this claim. The trial record shows that the evidence against Mr. Ingram was sufficient to support the guilty verdict. See Ferebee v. State, 967 So. 2d 1071, 1073 (Fla. 2d DCA 2007) ("When considering a motion for new trial . . . based on a claim that the verdict is against the weight of the evidence, the trial court must . . . determine whether a greater amount of credible evidence supports an acquittal." (quotation omitted)). As a result, there was no reasonable probability that a motion for new trial based on the weight of the evidence would have been successful. Because the motion would not have been successful, counsel was not deficient for failing to make the motion, and Mr. Ingram was not prejudiced by counsel's failure. Therefore, Mr. Ingram is not entitled to a COA on subclaim 1(c).

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issue was not raised or addressed on direct appeal. Thus, the state court seems to have relied on an unreasonable determination of fact. See id. § 2254(d)(2).

Subclaim 1(d)

In subclaim 1(d) Mr. Ingram says his appellate counsel was ineffective for failing to challenge the trial court's erroneous Richardson ruling on appeal. But, as discussed already, trial counsel failed to object to the Richardson ruling or otherwise bring the error to the trial court's attention. As a result, the issue was not preserved for appellate review. See Rose v. State, 787 So. 2d 786, 797 (Fla. 2001) ("[T]he failure of a party to get a timely ruling by a trial court constitutes a waiver of the matter for appellate purposes."). Appellate counsel cannot be faulted for failing to raise an issue that had no chance of success on appeal. See Chandler v. Moore, 240 F.3d 907, 917 (11th Cir. 2001) ("[A]ppellate counsel [i]s not ineffective for failing to raise a nonmeritorious issue."). Thus, Mr. Ingram cannot show that appellate counsel performed deficiently by failing to raise the Richardson issue on appeal. So no COA is warranted on this claim.

Claim 2: Alibi Defense

Next, Mr. Ingram asserted that trial counsel was ineffective for failing to investigate and call an alibi witness. Mr. Ingram said that on Christmas Eve in 1997, he and his son were stuck in traffic due to a car accident on the road they were traveling on. According to Mr. Ingram, they did not arrive home until after the time when A.I. says he molested her. Mr. Ingram argues that counsel should

have called as a witness the deputy sheriff who investigated the car accident to confirm Mr. Ingram's claim that he was stuck in the traffic caused by the accident.

Mr. Ingram has not shown that the deputy sheriff would have been able to offer this alibi. Even if the deputy sheriff could confirm the existence of traffic following an accident on Christmas Eve 1997, there is no indication from this record that the sheriff could say whether Mr. Ingram's vehicle was part of the post-collision traffic jam, much less the time Mr. Ingram arrived home. Thus, the sheriff's testimony would not have been exculpatory. And because the sheriff's testimony would not have been exculpatory, counsel was not deficient for failing to obtain this testimony, nor was Mr. Ingram prejudiced as a result. See Strickland, 466 U.S. at 687–88, 104 S. Ct. at 2064–65. Therefore, Mr. Ingram is not entitled to a COA on this claim.

Claim 3: Jury Instruction

In his third claim, Mr. Ingram argued that the trial court erred by failing to instruct the jury on the essential element of consent in the sexual battery instruction. He also asserted that appellate counsel was ineffective for failing to raise this issue on appeal.

Before bringing a habeas action in federal court, a petitioner must exhaust all state court remedies available for challenging his conviction and sentence, either on direct appeal or in a state postconviction motion. 28 U.S.C. § 2254(b)(1); see

also Ward v. Hall, 592 F.3d 1144, 1156 (11th Cir. 2010) ("[I]n order to exhaust state remedies, a petitioner must fairly present every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review."). The record shows Mr. Ingram did not raise his jury-instruction claim before the state court (neither on direct appeal nor in his state postconviction proceedings). As a result, he has failed to exhaust state remedies and so he cannot bring the claim in his § 2254 petition. See id.

The exhaustion requirement may be excused if the movant establishes (1) "cause for not raising the claim of error on direct appeal and actual prejudice from the alleged error," or (2) a fundamental miscarriage of justice, meaning actual innocence. McKay v. United States, 657 F.3d 1190, 1196 (11th Cir. 2011). To establish "cause," a defendant must show that some objective factor external to the defense impeded the effort to raise the claim properly in the state court. Henderson v. Campbell, 353 F.3d 880, 892 (11th Cir. 2003). Mr. Ingram has not made this showing. Therefore, reasonable jurists would not debate the District Court's conclusion that this claim was procedurally defaulted, and no COA is warranted.

Claim 4: Judicial Disqualification

In his next claim, Mr. Ingram asserted that (a) trial counsel was ineffective for failing to file a motion to disqualify the trial judge, after the prosecutor called Mr. Ingram's son's therapist as a witness only because the judge told the

prosecutor to do so, and (b) appellate counsel was ineffective for failing to raise this issue on appeal.

Even accepting that trial counsel was deficient for failing to seek disqualification after the trial judge openly coached the prosecutor to call a particular witness, Mr. Ingram has failed to show prejudice. He cannot show prejudice because, as the state court noted, the therapist's testimony related solely to the charges involving Mr. Ingram's son, and Mr. Ingram was acquitted of those charges. Because Mr. Ingram has not shown prejudice, his claim that trial counsel was ineffective for failing to file a motion to disqualify the trial judge fails. And, as a result, his claim that appellate counsel was ineffective for failing to raise the issue on appeal also fails. See Chandler, 240 F.3d at 917 ("[A]ppellate counsel [i]s not ineffective for failing to raise a nonmeritorious issue."). Therefore, no COA is warranted on this claim.

Claim 5: Plea Negotiations

Finally, Mr. Ingram argued that trial counsel was ineffective for failing to object to the trial court's interference with plea negotiations. This claim also fails. Specifically, Mr. Ingram has not shown that counsel's failure to object constituted deficient performance.

Under Florida law, the trial court is allowed to participate in plea negotiations, so long as the "judicial involvement [is] limited to minimize the

potential coercive effect on the defendant, to retain the function of the judge as a neutral arbiter, and to preserve the public perception of the judge as an impartial dispenser of justice." State v. Warner, 762 So. 2d 507, 513 (Fla. 2000) (quotation omitted). The record does not show that the trial court's actions during plea negotiations ran afoul of Florida law. As permitted under Warner, the trial court held plea deal discussions on the record and explained to Mr. Ingram the risks he faced by going to trial. Mr. Ingram says counsel should have objected to the trial judge's comment that "I'll make the decision for [Mr. Ingram]. This case is set for trial next Monday." Mr. Ingram says the court effectively robbed Mr. Ingram of the chance to consider and accept the plea deal. But the record shows otherwise. Mr. Ingram had from February 23, 2005 to March 9, 2005 to consider the state's plea offer—two days longer than the original window for considering the plea. By the time of the judge's comment at the March 9th pretrial hearing, defense counsel had had several conversations with Mr. Ingram about the plea decision, and had expressly told him this was his last chance to accept the plea offer. But Mr. Ingram refused to affirmatively accept or reject the offer. When the court eventually stepped in, it was to move the proceedings along and set the case for trial. At no time did Mr. Ingram say he wanted to enter a plea—to the contrary, he had previously said he was unwilling to accept the state's offer. Further, at no time did Mr. Ingram say he needed more time to make the decision. On this record, it

does not appear the trial court intervened in the plea process in a way that was improper. Thus, any objection would have been without merit, and counsel cannot be deficient for failing to raise an unmeritorious objection. See Chandler, 240 F.3d at 917. As a result, no COA is warranted on this claim.

Rule 59(e) Motion

Finally, Mr. Ingram also moves for a COA on the District Court's denial of his Rule 59(e) motion. The only grounds for granting a motion to alter or amend judgment under Rule 59(e) are new evidence or manifest errors of law or fact. See Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007). In his Rule 59(e) motion, Mr. Ingram argued that the District Court misapprehended the law and erred in denying his Richardson claim. As discussed above, reasonable jurists could debate the District Court's denial of Mr. Ingram's claim that trial counsel was ineffective for failing to seek a new trial based on the erroneous Richardson ruling. Therefore, reasonable jurists could also debate whether the District Court erred in denying his Rule 59(e) motion with respect to this claim. However, a COA on the Rule 59(e) motion would be moot because a COA will be granted on the District Court's denial of the Richardson issue in the underlying § 2254 petition.

CONCLUSION

For the reasons set out above, Mr. Ingram's COA motion is GRANTED on the following issue:

Whether counsel was ineffective for failing to file a motion for a new trial on the basis that the trial court's ruling regarding the evidence of incest-related material on Mr. Ingram's computer violated Richardson v. State, 246 So. 2d 777 (Fla. 1971).

Mr. Ingram's COA motion is otherwise DENIED. Mr. Ingram's motion for IFP status on appeal is GRANTED.

Barry D. Martin

UNITED STATES CIRCUIT JUDGE

[redacted]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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August 29, 2017

Lawrence Andrew Ingram
Lake CI - Inmate Legal Mail
19225 US HWY 27
CLERMONT, FL 34715-9025

Appeal Number: 16-16745-FF
Case Style: Lawrence Ingram v. Secretary, Florida Department, et al
District Court Docket No: 5:13-cv-00199-WTH-PRL

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Appellant's brief is due 40 days from the date of the enclosed order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Janet K. Mohler, FF
Phone #: (404) 335-6178

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16745-FF

LAWRENCE ANDREW INGRAM,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before: MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Lawrence Andrew Ingram has filed a motion for reconsideration and for expansion of a certificate of appealability ("COA"), as to this Court's order dated July 3, 2017, granting his motion to proceed *in forma pauperis* ("IFP") and granting a COA as to only one issue, in his appeal of the denial of his 28 U.S.C. § 2254 petition. Upon review, Ingram's motion for reconsideration and to expand the COA is DENIED because he has offered no new evidence or arguments of merit that warrant relief.

Additional material from this filing is available in the Clerk's Office.